Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

KEVIN CHRISTIAN, BRIAN HELLAND, and LARRY KIPPING,

Petitioners,

vs.

THE CITY OF GLADSTONE, MISSOURI,

Respondents.

Petition For Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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July 18, 1997

QUESTIONS PRESENTED

Where the federal circuits are now in total disagreement regarding the application of the Fair Labor Standards Act to paramedics employed by municipalities:

1. Whether courts are required to examine the nature and character of an employee's activities to determine the applicability of the partial overtime wage exemption. (*Carlson v. City of Minneapolis*, 925 F.2d 264 (8th Cir. 1991); *Justice v. Metropolitan Government of Nashville*, 4 F.3d 1387 (6th Cir. 1994) *O'Neal v. Barrow County Bd. of Com'rs*, 980 F.2d 674 (11th Cir. 1993) *Overstreet v. North Shore Corp.*,318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656 (1943); and

2. Whether municipalities must prove that public employee paramedics can be treated as firefighters for purposes of the partial overtime wage exemption only when the paramedics are regularly dispatched to fires, are an integral part of the fire protection activities and spend no more than 20% of their time in activities which do not qualify for the exemption. *Wouters v. Martin County, Florida*, 9 F.3d 924 (11th Cir. 1993); *O'Neal v. Barrow County Bd. of Com'rs*, 980 F.2d 674 (11th Cir. 1993); *Spires v. Ben Hill County*, 989 F.2d 683 (11th Cir. 1993); *Alex v. City of Chicago*, 29 F.3d 1235 (7th Cir. 1994); *Justice v. Metropolitan Government of Nashville*, 4 F.3d 1387 (6th Cir. 1994); *Alexander v. Kansas City, Kansas*, 1 Wage & Hour Cas. 2d (BNA) 1117 (D. Kan., Sep. 23, 1993); *Horan v. King County, Washington, Div. of Emer. Med. Serv.*, 740 F.Supp. 1471 (W.D. Wash. 1990).

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT:

The Petitioners, Kevin Christian, Brian Helland, and Larry Kipping, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the Eighth Circuit Court of Appeals, in this case, request for rehearing denied by the Eighth Circuit Court of Appeals, April 24, 1997.

OPINIONS AND ORDERS BELOW

The Eighth Circuit Court of Appeals reversed the decision of the of the District Court for Western District of Missouri which entered judgment in favor of Petitioners awarding them overtime wages. The Eighth Circuit Court of Appeals decision is reported at 108 F.3d 929. Appendix (App.), *infra*, A17-28. District Court Judge Howard Sachs found that the Petitioners (paramedics) were entitled to overtime wages over 40 hours because they spent more than twenty percent of their work time on work which was not fire protection or law enforcement related. The District Court Order is reported at 3 WHCases2d 281. App., *infra*, App. A1-16.

Following issuance of the Eighth Circuit Court of Appeals Opinion, Petitioners moved for a rehearing and a rehearing in banc. The Eighth Circuit Court of Appeals denied the request of Christian, Helland and Kipping. The denial of both motions by the Eighth Circuit Court of Appeals is reproduced in the Appendix to Petitioners' Petition for Certiorari. App., *infra*, A29.

JURISDICTION

Petitioners brought this action pursuant to 29 U.S.C. § 201 et seq. which grants jurisdiction to the United States District Court for the district in which the City of Gladstone was situated. After judgment in favor of the petitioners was entered by the trial court on December 22, 1995, the City of Gladstone appealed that judgment to the Eighth Circuit Court of Appeals. The Court of Appeals reversed the trial court in its opinion issued on March 17, 1997. On April 24, 1997, the Eighth

Circuit denied Petitioners' timely application for rehearing and rehearing en banc. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 207 Maximum hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or in employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

(k) Employment by public agency engaged in fire protection or law enforcement activities

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if ---

> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the less of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of

employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but not less than 28 applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ration to the number of consecutive days in his work period as 216 hours (or lower, the number of hours referred to in clause (B) of paragraph (1) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 C.F.R. § 553.210(a) (Appendix, A30)

29 C.F.R. § 553.212(a) (Appendix, A31)

29 C.F.R. § 553.213 (Appendix, A31-32)

29 C.F.R. § 553.215(a) (Appendix, A32-33)

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STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The city of Gladstone has a Department of Public Safety which provides fire protection, emergency medical care and law enforcement to the citizens of Gladstone, Missouri. The employees of the Department are known as Public Safety Officers. The City does not maintain a separate fire department, police

department or emergency medical department. Petitioners are three of the public safety officers who are trained as paramedics and carry the classification of Public Safety Officer-Paramedic. Petitioners and the other Paramedics are required to maintain their paramedic licenses from the State of Missouri in order to continue employment with the City as Paramedics.

The Paramedics, who provide emergency medical services for the city, are housed with the firefighting personnel and work the same schedule which, generally speaking, required the Paramedics to work a twenty-four hour shift and thereafter be off duty for forty-eight hours. This is commonly referred to as a 24/48 hour shift. The 24/48 hour shift resulted in the Paramedics working approximately 212 hours in a 28 day cycle. The City did not pay overtime wages to the Paramedics for all hours worked in excess of 40 hours per week, rather, the City only paid overtime wages for hours worked in excess of 212 hours in a 28 day cycle or the equivalent of 53 hours per week.

The Petitioners were also cross trained as police officers and firefighters, but spent virtually all of their time in activities related to providing purely emergency medical services such as responding to calls for intestinal flu, chest pain and other similar illnesses. These nonexempt emergency medical service calls were unrelated to exempt calls for fires, crime scenes, riots, vehicular accidents, and/or natural disasters.

The Paramedics were only paid overtime wages for hours worked in excess of 212 in a 28 day cycle because the City of Gladstone claimed that the Paramedics were firefighters for the purposes of the 29 U.S.C. §207(k) exemption from the normal

overtime payment requirement for hours worked in excess of 40. The city claimed the §207(k) exemption despite the fact that of the calls to which the Paramedics responded, eighty percent of the calls were for nonexempt emergency medical service matters that were unrelated to fires, crime scenes, riots, vehicular accidents and/or natural disasters, and in fact, only eleven percent of the calls which the Paramedics answered were related to fires and/or natural disasters.

Before the trial court, it was stipulated by the parties that during a typical 24 hour shift, the Petitioners responded to an average of 2.82 calls for nonexempt emergency medical services, .28 calls per shift were in response to vehicular accidents, and .34 calls per shift were related to fires and/or natural disasters. The parties further stipulated that it took one hour per call for all calls relating to requests for nonexempt medical matters which were unrelated to fires, crime scenes, riots, vehicular accidents, and/or natural disasters. One hour was spent on calls relating to vehicular accidents. The parties further stipulated that only thirty minutes per call were spent on calls responding to fires and/or natural disasters. Paramedics were instructed to disengage from those calls as quickly as possible to be available for nonexempt medical calls. Paramedics were also under instructions to respond to only certain type of fire alarms.

Therefore, eighty percent of the calls to which the Paramedics responded were nonexempt medical in nature. Eighty-five percent of the time the Paramedics spent responding to all calls were purely medical in nature, i.e. unrelated to fires, crime scenes, riots, natural disasters, and/or vehicular accidents

while only six percent of the hours spent on calls per day were spent on calls relating to fires or natural disasters.

In addition thereto, the PSO paramedics were required to spend thirty minutes per call on paperwork relating to the calls, which thirty minutes would be divided between the two paramedics and an additional fifteen minutes per call per paramedic completing ambulance forms relating to the call.

An additional twenty-five minutes per 24 hour shift was spent on emergency medical service training unrelated to fire protection activities and an additional fifteen minutes per shift on self-study unrelated to fire protection activities. On average, the Paramedics also spent an hour on ambulance clean up and routine maintenance and an additional thirty minutes on interdepartmental mail deliveries and uniform laundry delivery. The remainder of the time per shift was spent eating, relaxing and sleeping.

II. PROCEEDINGS IN THE COURT BELOW

In 1994, Petitioners filed this action for payment of their overtime wages for all hours worked in excess of 40 per seven day period. The basis for their action was that, as paramedics, the City was not entitled to apply the §207(k) exemption to them and, therefore, was required to pay them overtime wages in accordance with 29 U.S.C. §201 et seq., the Fair Labor Standards Act. Jurisdiction of this action in the court of first instance was conferred 29 U.S.C. §216(b), 28 U.S.C. §1331 and 28 U.S.C. §1337. The trial court agreed and entered summary judgment in favor of Petitioners.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit Court of Appeals has, contrary to all other Circuit Courts of Appeal, prevented all public employee paramedics within the Eighth Circuit from receiving the benefits of the civil right conferred upon them, with regard to overtime wages, by the Fair Labor Standards Act. The Court of Appeals for the Eighth Circuit improperly found that public employee paramedics can be treated as firefighters when the paramedics are not regularly dispatched to fires, are not an integral part of the fire protection activities and spend more than 20% of their time in activities that do not qualify for the exemption.

I. This Court should resolve the sharp conflict that now exists among the Federal Circuits as a result of the Eighth Circuit Court of Appeals decision in this case regarding the applicability of the 29 U.S.C. §207(k) exemption for fire-fighting activities to paramedics.

A municipal employer is not entitled to claim the benefits of the Section 207(k) exemption to the Fair Labor Standards Act with regard to its paramedic employees unless the municipal employer meets its burden to prove that the paramedic employees were regularly dispatched to fires, were an integral part of fire protection activities of the fire department and spent less than twenty percent of their time in nonexempt activities, i.e. activities that are unrelated to fires, crime scenes, riots, natural disasters, and accidents. In this case, the Eighth Circuit Court of Appeals incorrectly found that a purely emergency medical call made by a paramedic for such things as an intestinal flu complaint, a complaint of chest pain or a similar illness to be

exempt even though such work has absolutely no relationship to a fire protection activity. The Eighth Circuit has equated treating an intestinal flu patient with fighting a house fire.

The opinion handed down by the Eighth Circuit conflicts with **every** other decision in the Circuit Courts of Appeal and with **every** other final District Court decision which has directly addressed the issue of whether paramedics, who perform nonexempt emergency medical calls as the main part of their duty, should be included with the Section 207(k) exemption of the Fair Labor Standards Act. As a consequence of this decision, the thousands of paramedics throughout the Eighth Circuit will be treated in an inferior manner to that of all other paramedics throughout the country.

The Eighth Circuit panel decision misinterprets the regulations as they apply to paramedics in that it has found that all emergency medical service activities are included in firefighting activities even if not related to a fire in any way. **Every** court which has examined the regulations as to whether strictly emergency medical calls could be considered as exempt firefighting activities have concluded that such calls are nonexempt calls:

11th Circuit - *Wouters v. Martin County, Florida*, 9 F.3d 924, 932 (11th Cir. 1993); *O'Neal v. Barrow County Bd. of Com'rs*, 980 F.2d 674, 677 (11th Cir. 1993); *Spires v. Ben Hill County*, 989 F.2d 683 (11th Cir. 1993);

7th Circuit - *Alex v. City of Chicago*, 29 F.3d 1235 (7th Cir. 1994);

6th Circuit - *Justice v. Metropolitan Government of Nashville*, 4 F.3d 1387 (6th Cir. 1994); (District Court) *Craig v. City of*

Chattanooga, Tenn., 910 F.Supp. 384 (E.D. Tenn. 1996).

9th Circuit (District Court) - *Horan v. King County, Washington, Div. of Emer. Med. Serv.*, 740 F. Supp. 1471 (W.D. Wash. 1990);

10th Circuit (District Court) - *Alexander v. Kansas City, Kansas*, 1 Wage & Hour Cas. 2d(BNA) 1117 (D. Kan., Sep. 23, 1993);

1st Circuit (District Court) - *Littlefield v. Town of Old Orchard Beach*, 780 F.Supp. 64, 30 Wage & Hour Cas. (BNA) 1206 (D. Me. 1992);

4th Circuit (District Courts) - *Roy v. County of Lexington*, 928 F. Supp. 1406 (D.S.C. 1996); *Burgess v. Catawaba County*, 805 F.Supp. 341 (N.C.W.D. 1992); *Nalley v. Mayor and City Council of Baltimore*, 796 F. Supp. 194 (D. Md.1992);

Taken to its logical conclusion, the Eighth Circuit's opinion eliminates the necessity of examining any of the activities of any paramedic personnel. According to the Eighth Circuit, once a paramedic or other Emergency Medical Service (EMS) employee is given fire training and incorporated by a city into the fire division of a public safety department, all of his or her job duties will be exempt regardless of whether those duties have anything to do with supporting or actually fighting fires. It allows form to supplant substance. It would be possible for public employee paramedics to spend all of their time on patient transfers or work at a hospital and such work would still fall within the exemption under the decision rendered by the Eighth Circuit. There is nothing stated in any of the regulations or cases decided in any other jurisdiction which support the conclusion that all emergency medical calls should be included in exempt firefighting activities. If transporting a stroke patient to the

hospital (a pure EMS call) is exempt work, then virtually any work could be considered exempt work. This "logic" is irreconcilable with the example of planting trees as described in the regulation. 29 C.F.R. §553.212(a). And frankly, planting trees is more related to firefighting than transporting a stroke victim to the hospital, as it assists in fire prevention and fire containment.

Until now, every court which has addressed the distinction between exempt and nonexempt activities has concluded that activities which have nothing to do with either firefighting or law enforcement must be nonexempt. For the Eighth Circuit to have determined that nonexempt emergency medical calls are exempt work, the regulations must be have been considered meaningless. Section 553.215 discusses whether ambulance and rescue personnel should be included in the exemption when they are trained and regularly dispatched to respond to five specific types of calls: fires, crime scenes, riots, natural disasters and accidents. Each of those five calls have either fire protection or law enforcement characteristics.

Despite the regulations and all existing case law, the Eighth Circuit concluded that "[p]roviding paramedic services on accident and medical emergency call not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their job." Eighth Circuit Opinion, at page A28. However, if one accepts that a paramedic is really a firefighter, then work performed in responding to a nonexempt emergency medical call absolutely alters the nature of the paramedic's duty as a firefighter and requires them to perform tasks unrelated to their job as a firefighter.

Logic, common sense and the regulations demand that an examination be made of whether the work performed by paramedics is exempt or nonexempt based upon whether the work is related to firefighting activities. The focus must be upon the nature of work performed and not upon the title given to the employee. Whether the city has correctly classified the Plaintiffs/Petitioners depends on the character of their responsibilities and tasks, not on their job titles or places of work. *See, Carlson v. City of Minneapolis*, 925 F.2d 264, 265 (8th Cir.1991); *Justice, supra* at 1392. Therefore it is necessary to determine the nature of the paramedics tasks and whether those tasks are related to firefighting because Section 553.212 requires the city to pay overtime if an employee spends more than twenty percent of his or her time on activities unrelated to firefighting.

The crux of the analysis must be the nature of the function being performed. If the duty is purely medical, it is nonexempt. *See O'Neal, supra* at 681; *Alexander, supra* at 1123; *Wouters, supra* at 932; and *Justice, supra* at 1399. If it is related to firefighting, it is exempt. By finding that all calls are exempt, the Eighth Circuit effectively wrote §553.212 out of the regulations.

The analysis is no different because Petitioners are employed by a public agency which requires its employees to perform more than one function. Section 553.213(a) specifically addresses "public safety officers" and permits the public agency to apply either the section 7(k) or 13(b)(20) exemption, provided that each of the activities performed meets the appropriate tests set forth in §§ 553.210 and 553.211.

> However, all time spent in nonexempt activities by public safety officers within the work period, whether performed in connection with fire protection or law enforcement functions, or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work discussed in § 553.212.

Id. It is clear from the regulations that nonexempt activities are nonexempt because of the nature of the activity. This Court simply cannot allow the Eighth Circuit's conflicting, senseless, aberrant opinion to stand.

As set forth in the *O'Neal* case "The regulations clearly evince a design that if rescue and ambulance service workers are treated synonymously with firefighters or law enforcement personnel for purposes of Section 7(k), they are also subject to the 80/20 rule that is applicable to these principal occupations. It would be patently unfair to extend the regulatory protection of the 80/20 rule to firefighters and law enforcement personnel who come under the Section 7(k) exemption by specific congressional mandate, but not to extend this protection to rescue and ambulance service workers who are brought under the Section 7(k) exemption only by implementing regulation. We, therefore, conclude the 80/20 rule does apply to ambulance and rescue service workers who are brought within the coverage of the partial exemption in Section 7(k) by 29 C.F.R. Section 553.215." *O'Neal*, *supra* at 681; *See also Justice*, *supra* at page 1396-1397 (adopting the *O'Neal* standard). *O'Neal* further states that "we find a consistent reading of this group of regulations requires that the 80/20 rule be made applicable to rescue and ambulance service personnel whether they are brought within

the Section 7(k) exemption by Section 553.210, Section 553.211, or Section 553.215." *O'Neal*, *supra* at 680. A finding otherwise would mean that the city would be free to dispatch its paramedics to do any job without fear of losing the overtime exemption, and "clearly, such a ludicrous result is not contemplated by the regulations at issue." *O'Neal*, *supra* at 680.

The Eighth Circuit relied upon *Schmidt v. County of Prince William, Va.*, 929 F.2d 986 (4th Cir. 1991) in support of its conclusion that nonexempt emergency medical calls are exempt. Neither party cited to *Schmidt* in any briefing because the *Schmidt* opinion was not and is not relevant. The *Schmidt* decision cites one case in support for its reasoning and that case[1] has been **overruled in its entirety** by the Eleventh Circuit. Every decision rendered in the 4th Circuit regarding the applicability of the 207(k) exemption to paramedics has ignored *Schmidt* and followed the analysis of *Spires*, *Horan*, *Justice*, *Wouters* and *O'Neal*. *Roy v. County of Lexington*, 928 F. Supp. 1406 (D.S.C. 1996); *Burgess v. Catawaba County*, 805 F.Supp. 341 (N.C.W.D. 1992); and *Nalley v. Mayor and City Council of Baltimore*, 796 F. Supp. 194 (D. Md. 1992). Each of these cases was decided after *Schmidt*, and support Petitioner's position and the trial court's judgment. The reason *Schmidt* has not been followed even in its own Circuit regarding any issue concerning paramedics is because it was not a paramedic case. *Schmidt* was a case interpreting the "training" provisions of the FLSA regulations as

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[1]The "supporting case" *O'Neal v. Barrow County Board of Commissioners*, 743 F.Supp. 859 (N.D.Ga.1990) cited by *Schmidt* was **overruled in its entirety** by the Eleventh Circuit in *O'Neal v. Barrow County Bd. of Com'rs*, 980 F.2d 674 (11th Cir. 1993).

they applied to firefighters who were temporarily acting as fire dispatchers.

Until this Eighth Circuit Court of Appeals decision, it was clear that exemptions under the Fair Labor Standards Act "[were] to be narrowly construed against the employer asserting them, . . . and ought to be applied only in those circumstances which plainly and unmistakably come within their terms and spirit." *Donovan v. Bereuter's, Inc.*, 704 F.2d 1034, 1036 (8th Cir. 1983). In addition, all of the tests which are set forth by the Code of Federal Regulations in reference to the § 207(k) exemption must each be met before the employer is entitled to the exemption. Unless a municipal employer meets all of the relevant tests, the employees should be entitled to their civil rights as set forth in the Fair Labor Standards Act and said paramedics should be entitled to overtime wages for hours worked in excess of 40 in a week.

This Court should overturn the decision of the Eighth Circuit Court of Appeals in this case which sharply conflicts with all other Circuit Courts of Appeal. In doing so, this Court will reestablish the consistency and clarity provided to this area of the law by the previous Circuit Court of Appeal decisions, such as *Wouters*, *Justice*, and *O'Neal*.

Prior to the Eighth Circuit decision in this case, it was clear that in order to claim the exemption under 29 U.S.C. §207(k), a municipal employer must demonstrate that:

(1) its paramedics are employees

(a) engaged in fire protection activities as set forth in C.F.R. Section 553.210(a) or

(b) are an integral part of the fire protection activities and are engaged in activities that are substantially related to the firefighting activities as set forth in §553.210(a) and §553.215, and

(2) they spend no more than twenty percent of his/her time working in nonexempt activities as limited by §553.212.

All of the tests set forth above must be met by the City before it would be entitled to apply the § 207(k) exemption to its paramedics. The paramedic must be (a) engaged in fire protection activities, (b) be a integral part of the fire department, and (c) perform less than 20% of their time in work unrelated to fighting fires.

A. Fire Protection Activities

Section 553.210(a) of the Code of Federal Regulations establishes a four-part test which defines the phrase "any employee . . . in fire protection activities" as used in § 207(k) of the Act.[2] The Stipulation of Facts quite emphatically shows that

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[2]"As used in Sections 7(k) and 13(b)(20) of the Act, the term 'any employee' in fire protection activities' refers to any employee (1) who is employed by an organized fire department or fire protection agency; (2) who has been trained to the extent required by State Statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, . . . the term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215." §553.210(a)

Petitioners were employed as paramedics. It was only the structure created by the City which assigned Petitioners to the Fire/EMS Bureau of the Public Safety Department upon which the City claimed the exemption. "Whether the city has correctly classified the [plaintiffs] depends on the character of the [their] responsibilities and tasks, not on their job title or place of work." *Carlson*, 925 F.2d at 265 (citing *Overstreet v. North Shore Corp.*, 318 U.S. 125, 132, 63 S.Ct. 494, 498, 87 L.Ed. 656 (1943)).

The parties stipulated that paramedics did not respond to all fires, only "regular" and "general" alarms, and thus did not control fires of "any" type.[3] Defendant has therefore failed to demonstrate the necessary facts under subsection (3).

Subsection (4) addresses the issue of an employee's primary duty of firefighting. *See*, *Alexander v. Kansas City, Kansas*, 1 Wage & Hour Cas. 2d (BNA) 1117 (D. Kan., Sep. 23, 1993). *Alexander* indicates that subsection (4) requires the employee to be performing firefighting as his or her primary function. *Id.* at 1122. There is little question under the stipulation of facts that Petitioners are primarily engaged in performing the duties of a paramedic. Paramedics, if available for a fire call, will respond only to "general" and "regular" alarms but are instructed to

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[3]The District Court noted that because the plaintiffs disengage as soon as practicable from fire calls to be available for medical calls, spend less time on fire calls, do not respond to all fire calls, have some paramedics who were not trained in firefighting, and required all paramedics to maintain their paramedic licenses that it "is quite doubtful" that paramedics had a legal duty to prevent fires. *Christian v. City of Gladstone*, 3 WHCases2d 281 (W.D. Mo., 1995).

disengage as soon as practicable. If the employee is not primarily involved in fighting fires, he or she should not be considered as an employee in fire protection activities.

Section 553.210(a) goes on to say that term would also include "rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. Thus, it is clear that the regulations did not intend to include paramedics within the definition of firefighters. That section of the regulations goes on to directly address the issue of rescue and ambulance service personnel, which included those personnel only when they form an "integral part" of the public safety department. Thus, a different test must be applied to determine whether Petitioners form an integral part of the Gladstone Public Safety Department.

B. Substantially Related and/or Integral Part

Section 553.210(a) does not define the term "integral part" when addressing the issue of paramedics. However, it does refer to Section 553.215 which separately address "ambulance and rescue service employees. In subsection (a) of that section, the regulations establish a two part test to determine whether such employees are "substantially related" to firefighting or law enforcement activities and treats paramedic activities as substantially related to either firefighting or law enforcement activities when:

> (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service

> employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. §553.215

Paramedics must meet both parts of the test to be considered "substantially related." In the present case, Petitioners clearly do not meet subsection (2) of the test. The Eighth Circuit chose to completely ignore this requirement to the detriment of the civil rights of Petitioners and thousands of other paramedics.

O'Neal v. Barrow County Bd. of Com'rs, 980 F.2d 674, 677 (11th Cir. 1993) sets forth specific factors to be considered regarding whether an employer regularly dispatches its Emergency Medical Service personnel to either firefighting or law enforcement scenes:

(a) the percentage of the EMS Service's total calls that are fire, crimes, and automobile accidents[4];

(b) the percentage of total EMT man-hours spent responding to fires, crimes, and automobile accidents; and

(c) the percentage of total number of all fires, automobile accident, and police calls that occur throughout the county to which the Service is dispatched.

O'Neal, supra, at 679. In this case, the parties stipulated that approximately nine (9%) percent of the calls to which the Petitioners are dispatched involve vehicular accidents and eleven (11%) involve fires and natural disasters. Eighty (80%) percent of the calls were purely medical emergencies unrelated to fire or law enforcement activities. In addition, the stipulation sets forth

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[4]EMS responses to riots and natural disasters should be considered where supported by the facts.

that the percentage of total paramedic man-hours spent responding to fires and natural disasters was six (6%) percent with an additional nine (9%) percent to automobile accidents. Although no specific figure has been identified as the minimum to qualify as regularly dispatched, it is clear that where only twenty percent of the total calls and fifteen (15%) percent of the total man hours are spent on exempt activities, the City of Gladstone has clearly failed to meet its burden of showing that Petitioners are "regularly dispatched."

As all of the reported cases which have addressed the percentage numbers have suggested that percentages of thirty-seven percent were not sufficient to qualify as regularly dispatched, it would be difficult to imagine that the regularly dispatched requirement could possibly be met with percentages of twenty or fifteen percent, respectively. *See, Spires v. Ben Hill County*, 980 F.2d 683 (11th Cir. 1993).

C. The 20 Percent Nonexempt Activity Limitation Rule.

"A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part." 29 C.F.R. § 553.212(a). Thus, municipalities must also show that their employees spend less than twenty percent of their time in nonexempt activities in order to apply the § 207(k) exemption. This 80/20 rule has been addressed by several circuits in determining whether paramedics must be paid overtime on a forty hours a week basis. *See, e.g., Wouters v. Martin County, Florida*, 9 F.3d 924, 932 (11th

Cir. 1993); *O'Neal v. Barrow County Bd. of Com'rs*, 980 F.2d 674, 677 (11th Cir. 1993); *Alex v. City of Chicago*, 29 F.3d 1235 (7th Cir. 1994); *Horan v. King County, Washington, Div. of Emer. Med. Serv.*, 740 F. Supp. 1471 (W.D. Wash. 1990); *Alexander v. Kansas City, Kansas*, 1 Wage & Hour Cas. 2d(BNA) 1117 (D. Kan., Sep. 23, 1993); *Justice v. Metropolitan Government of Nashville*, 4 F.3d 1387 (6th Cir. 1994). Those cases have specifically held that the 80/20 rule is in addition to the other requirements that an employer must meet before it is entitled to the section 7(k) exemption. *Id.* The Defendant has cited no authority to any court to the contrary.

It has been specifically held that all time spent by paramedics performing tasks which are unrelated to fire protection or law enforcement activities must be considered exempt for purposes of determining exempt versus nonexempt time. *O'Neal v. Barrow County Bd. of Com'rs*, 980 F.2d 674, 681 (11th Cir. 1993). Thus, unless the defendant can show that tasks which are being performed by Petitioners are directly related to fire protection or law enforcement activities it must be considered nonexempt time. The Eighth Circuit ignored this focal issue of considering the **character** of the **activity** engaged in by the paramedics. Is it:

a. fire related,
b. law enforcement related, or
c. neither, in which case the activity is non exempt.

To allow the Eighth Circuit decision to stand would virtually eliminate nonexempt as a category.

In the present case, Petitioners spend well in excess of twenty percent of their time on work which is nonexempt.

From the parties stipulation, the trial court found that over three and one half hours were spent by paramedics in nonexempt emergency medical calls. In addition, each paramedic spent, on average, 42.3 minutes on ambulance forms related to the emergency medical call and 42.3 minutes on additional paperwork specifically related to such calls. The trial court also found that each paramedic spent twenty five minutes per shift on EMS training, with an additional 15 minutes per shift on self study that was unrelated to fire-protection activities. In accordance with all other case-law and the governing regulations, the trial court correctly concluded that all of these activities were not related to fire protection activities and, therefore, nonexempt. *See, O'Neal, supra* at 681, and 29 C.F.R. §553.212. The total of these activities alone exceeds 5 and 1/2 hours which, in turn, exceeds the twenty percent limit on nonexempt activities. Petitioners spend additional time in other activities which are also exempt.

This Court should reverse the decision of the Eighth Circuit Court of Appeals in this matter and establish the standards for examining these matters consistent with the clear directions given in the *O'Neal*, *Wouters*, *Spires* and *Justice* opinions and award Petitioners their reasonable attorneys fees pursuant to 29 U.S.C. § 216(b).

II. The Eighth Circuit failed to comply with the instructions as set forth in §553.213, which requires that a determination be made as to which, if any, exemption applies to Petitioners, the firefighter exemption or the law enforcement exemption, and failure to do so necessitates a remand for a factual determination.

The Code of Federal Regulations in § 553.213 demands that if "public agencies have employees (often called"public safety officers") who engage in both fire and law enforcement activities", (such as Petitioners), and a §207(k) exemption is found to be applicable, then it must be determined which exemption is applicable, the law enforcement exemption or the firefighter exemption. §553.213(a). The test is clearly set forth in §553.213(b), "For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period."

The Eighth Circuit opinion wrongfully found that purely emergency medical calls (i.e. flu, chest pain and stroke victims) are exempt, but thereafter fails to address in any way whether such calls should be considered as a fire protection activity or a law enforcement activity. It is difficult to categorize such time as either since a pure emergency medical call is wholly unrelated with either fire or law enforcement. However, for purposes of the regulations, it became necessary to make that determination when the Eighth Circuit took its deviant course, yet the Eighth Circuit failed to decide which (if any) of the two exemptions applies. *Carlson v. City of Minneapolis,* 925 F.2d 264, 265 (8th Cir. 1991). Section 553.213(b) specifically requires that the Municipality meet this burden as well. To permit a Municipality to circumvent this requirement totally ignores the well established rule that the government body which seeks to enforce an exemption from the letter of the Fair Labor Standards Act, it must prove its entitlement to that exemption and the exemption should be narrowly construed. Here,

without proof and a determination by the Eighth Circuit that purely emergency medical calls are fire protection activities, the Eighth Circuit has further erred.

A Municipality cannot meet this burden by simply housing the paramedic personnel within the fire division branch of the public safety office. Such a ruling would totally supplant substance with form. The cases are replete with the necessity that the distinction of whether overtime should be paid is based upon the employee's actual work rather than the label his employer might give him. *Justice*. Therefore, to be entitled to the fire protection exemption, the duties of the employee must have some relationship to fire protection or the support of fire protection activities. Purely emergency medical calls do not have any such relationship; they are nonexempt.

Under the Act, the City of Gladstone is required to pay all of its employees overtime for hours worked in excess of forty hours per week unless the employer can show that those employees fall under an exemption. It is the City's burden to prove that it is entitled to an exemption under the statute and here, the defendant City totally failed to meet its burden. *Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 209, 86 S.Ct. 737, 749, 15 L.Ed.2d 694 (1966). The failure of the Eighth Circuit to determine which exemption applies to purely emergency medical calls further demands reversal.

III. This case presents a question of critical national importance in that failure to reverse the Eighth Circuit's decision will result in thousands of workers in many

industries being denied their civil rights pursuant to the Fair Labor Standards Act.

The Decision of the Eighth Circuit in this case abandons the well established Supreme Court precedent which requires a classification and examination of an employee's activities and a determination of the character of the employee's responsibilities and tasks, rather than classification based on their job title or place of work, in determining which, if any, exemptions may apply to an employee. See *Carlson*, 925 F.2d at 265 (citing *Overstreet v. North Shore Corp.*, 318 U.S. 125, 132, 63 S.Ct. 494, 498, 87 L.Ed. 656 (1943). In other words, the law requires an examination of the substance of an employee's classification, not the form of an employee's job title or handbook description.

The case of *Carlson v. City of Minneapolis* arose because the city classified its arson squad investigators as employees engaged in fire protection activities thereby making them eligible for overtime pay only after working fifty-three hours during any given seven day work period. *Carlson, supra* at 265. In *Carlson*, the court held "whether the city has correctly classified the investigators depends on the **character** of the investigators' responsibilities and tasks and not on their job title or place of work. *Id.* Despite the fact that the City of Minneapolis considered its arson squad investigators as being employed by the fire department, the court looked to the character of their actual activities and found that the activities were not related to fire protection activities and, therefore, found that the 207(k) firefighter exemption did not apply.

Similarly in a case involving the application of the Fair Labors Standards Act to a situation involving parties who were maintaining and operating a toll road and drawbridge over navigable water, this Court held, "The nature of the employer's business is not determinative because as we have repeatedly said, the application of the Act depends upon the character of the employee's activities." *Overstreet v. North Shore Corporation*, 318 U.S. 125, 132, 63 S.Ct. 494, 498 (1943).

Courts have continually held to this rule in various factual scenarios involving the Fair Labor Standards Act. For example, in *Reeves v. International Telephone and Telegraph Corp.*, 357 F.Supp. 295 (1973, wherein an employer claimed an entitlement to the bona fide executive, administrative or professional exemption to a microwave field engineer employed by the defendant. The exemption claimed was pursuant to 29 U.S.C. Section 213(a)(1). In the case, the court noted "We must consider the individual [employees] responsibilities and tasks even though he held a job title which may be thought to be exempt after considering the description of tasks in responsibility such job supposedly entailed." *Reeves, supra* at 302. The court further noted "the exemption of any individual depends upon his duties and other qualifications and not upon how the employer classifies the employee." *Reeves, supra* at 302-303.

In *Walling v. W.D. Haden Co.*, 153 F.2d 196 (5th Cir. 1946), the Fifth Circuit examined an employer's claimed exemption to the payment of overtime wages for persons who were employed as dredgemen. The exemption claimed was pursuant to 29 U.S.C. Section 213(a)(3) allowing an exemption from the overtime wage payment for employees employed as a seaman.

The *Walling* court noted that it must "look to what the employee's do, and not to rest on a mere matter of a name, or the place of their work. The entire act is pervaded by the idea that what each employee actually does determines its application to him." *Walling*, *supra* at 1999. Again, the court found it necessary to examine the character of the work performed by the employee in considering whether or not the exemption was valid. See also *Hearnsberger v. Gillespie*, 435 F.2d 926 (8th Cir. 1970), indicating that it is the work duties of the employee not the place of employment that determines whether or not he is covered by the act, in a case involving a claimed exemption to 29 U.S.C. §213(a)(6).

The decision by the Eighth Circuit in this case deviates so substantially from the clearly established principal of law requiring a review of the character of the employee's activities in determining the application of an exemption will have a dramatic impact on employees throughout the Eighth Circuit. Now, an employer need only define an employee's job duties to include exempting duties and to give the employee a job title which appears to validate an exemption. This abuse of the Act will affect employees of all walks of life if an employer chooses to claim an exemption. The Eighth Circuit decision effectively changes the burden of proof to the employee and broadly construes the exemptions rather than the required narrow construction. It will effectively destroy the civil rights of thousands of employees pursuant to the Fair Labor Standards Act.

This Court should reverse the decision of the Eighth Circuit and reinstate the decision of the trial court and thereby protect

substantial rights of thousands of employees throughout this circuit on this matter of substantial importance.

CONCLUSION

The §207(k) exemption allows a municipality to avoid payment of overtime wages to its employees engaged in fire protection or law enforcement activities to work more hours in a 28 day work period. However, these exemptions under the Act are to be narrowly construed against an employer. It must be the employer's burden to prove that it is entitled to an exemption under the statute. Although the City of Gladstone claimed its paramedics are engaged in fire protection activities for the purposes of that §207(k) exemption, it has failed in all respects to demonstrate its entitlement to the exemption.

Petitioners are not firefighters as defined by §553.210(a) in that they do not have the responsibility for fighting all fires and spend only a small fraction of their time fighting fires. In addition, Petitioners do not form an integral part of the fire protection activities and they are not regularly dispatched to fires as demanded by §553.215 because eighty percent of the calls to which the Petitioners responded were purely emergency medical calls and therefore unrelated to fires, crime scenes, riots, natural disasters and accidents. Over eighty percent of their time spent responding to calls were spent on calls that were purely emergency medical calls, such as calls from patients with the flu, chest pain and strokes.

Finally, even if the Petitioners were an integral part of the fire protection activities, they spend more than twenty percent

of their time in nonexempt activities and, therefore, the city cannot apply the exemption to the paramedics since it failed the test set forth in §553.212 which limits the amount of time an otherwise exempt employee can spend on a nonexempt activities to twenty percent of the employee's working time.

Because of the importance of the questions presented, and for all of the reasons stated, Kevin Christian's, Brian Helland's and Larry Kipping's Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals should be granted.

Respectfully submitted,

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July 18, 1997

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

KEVIN CHRISTIAN, BRIAN HELLAND, AND LARRY KIPPING,	)	
Plaintiffs,	)	Case No. 94-0500-CV-W-6
vs.	)	
THE CITY OF GLADSTONE, MISSOURI,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Defendant city of Gladstone has filed a motion for reconsideration of the court's order dated October 10, 1995,[1] which granted plaintiffs' motion for summary judgment and denied defendant's motion for summary judgment. Seven days following entry of the October order, the parties filed a stipulation of facts, pursuant to a previous oral agreement, and requested that the court base its ruling on the respective summary judgment motions on these stipulated facts. The stipulation also indicated that count IV of plaintiffs' second amended complaint[2] should be dismissed without prejudice, and that plaintiffs wished to withdraw their pending motion for the

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[1]This order will hereinafter be referred to as the "October order."

[2]Count IV of the second amended complaint alleges retaliatory discharge.

determination of the appropriateness of defendant's responses to requests for admissions.[3] The court will first address the alleged legal errors raised in defendant's motion for reconsideration, and will then review the October order in light of the recent filing of stipulated facts.

I. Defendant's Claims of Legal Error

Defendant submits that the court "took [a] wrong turn" by evaluating plaintiffs' eligibility for the firefighter exemption under 29 C.F.R.[4] §553.215(a).[5] Defendant contends that

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[3]This motion was denied without prejudice in the October order, and thus is no longer pending.

[4]Unless otherwise noted, section references are to Title 29 of the Code of Federal Regulations.

[5]§ 553.215(a) states: Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b) (20) if their services are substantially related to firefighting or law enforcement activities in that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters or law enforcement personnel injured in the performance of their respective, duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in §553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of

plaintiffs meet the four-part standard in S553.210(a),[6] and that paramedics who satisfy these requirements are subject to a much

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work time during the work period.

In the October order, the court noted that plaintiffs were certified as firefighters, and stated that it was "unwilling to find that the regular dispatch requirement [was] not met." October order, at 5-6.

[6]§553.210(a) states:

As used in sections 7(k) and 13(b)(20) of the Act, the term 'any employee . . . in fire protection activities' refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental nonfirefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as 'trainee,' 'probationary,' or 'permanent,' or of their particular specialty or job title (e.g., firefighter, engineer, hose or ladder operator, fire specialist, fire inspector, lieutenant, captain, inspector, fire marshal, battalion chief, deputy chief, or chief), and regardless of their assignment to support activities of the type described in paragraph (c) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See §553.215.

broader version of the 80/20 rule, infra, in that only activities unrelated to fire protection or emergency medical services are treated as nonexempt. Defendant asserts that the court, by failing to accept this revision of the statute and regulations, "overlooked a controlling, threshold legal standard for the resolution of the exemption issue in this case." Defendant does not cite any authority for this position: defendant's version of the 80/20 rule is not mentioned in any of the applicable cases, and the language of the statute and the regulations is not reasonably susceptible to such an interpretation.[7]

Section 553.210 appears to contemplate "the typical fire fighter." Alexander v. Kansas City, Kansas, No. 92-2379, 1993 U.S. Dist. LEXIS 14505, at *15 (D. Kan. Sept. 23, 1993). Similar to the situation present in Alexander, the court finds that defendant has not satisfactorily established that each element of §553.210(a) is present.

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[7]A simple answer, of course, is that the statute exempts employees in "fire protection activities" (29 U.S.C. §207(k)), which apparently would not exempt persons who are essentially or primarily paramedics. As previously suggested, the time demands of paramedical emergency work may well be similar to those firefighters, and an amendment to the statute may be persuasively advocated. There should be a presumption, however, against "amendment by regulation." Similarly, a tortured reading of 553.210(a) which would somehow avoid the 80/20 rule, or would treat pure medical emergency activities as somehow equated to exempted firefighting activities, must be firmly rejected if the statute is given fair application.

Plaintiffs may be, in effect, employed by the fire department, as defendant has combined the fire department with the emergency medical services function to form a Fire/EMS division. October order, at 2. Plaintiffs, however, contend that this requirement is not satisfied. Plaintiffs are also certified as firefighters by the state, id., which satisfies the second element of §553.210(a).

It is most unlikely that plaintiffs satisfy part three of the test. When responding to fires, the stipulation of facts states that plaintiffs "engage in firefighting activities to whatever extent required by the circumstances, although they disengage as soon as reasonably practicable in order to be available for other calls." (Stipulation of Facts, p. 4, ¶18). Plaintiffs spend an average of thirty minutes on a fire-related call, as opposed to one hour on an emergency medical or accident call. (Stipulation of Facts, ¶24). Before January 1992, moreover, "PSO-Paramedics were not dispatched to fire scenes to initiate firefighting activities." Id. Whether plaintiffs' secondary role at fire scenes is pursuant to a legal duty to prevent fires is quite doubtful. Cf. Alexander v. City of Kansas City, Kansas, 1993 U.S. Dist. LEXIS 14505, at *15 (plaintiffs, paramedics whose fire suppression activities at fire scenes were seemingly secondary to their emergency medical assistance, probably did not fall within element three of § 553.210(a)). Additionally, paramedics who are not trained in fire suppression are sometimes assigned to the Fire/EMS Bureau and work for up to one year before receiving such training. (Stipulation of Facts, ¶13). Conversely, continued employment is conditioned on maintenance of the paramedic license, (Stipulation of Facts, ¶12), which indicates that plaintiffs' primary duties are not firefighting.

Defendant has also not shown that plaintiffs satisfy part four of the test. Prior to 1992, PSOs were prohibited from responding to fire calls. (Suggestions in Support of Plaintiffs' Motion for Summary Judgment, p. 6, ¶33 (citing the affidavit of Brian Helland, Exhibit 5 to Plaintiff's Motion for Summary Judgment, at ¶20); see also Deposition of William Adamo, Plaintiff's Exhibit 7, pp. 24-25). Plaintiffs assert that the objective of the policy change "was to place the paramedics in a position to respond to a medical emergency 'as soon as practical.'" (Suggestions in Support of Plaintiffs' Motion for Summary Judgment, p.9). Defendant has not countered this assertion. If plaintiffs, since 1992, have been performing a significant amount of necessary fire suppression activities, defendant would have less need for "traditional" single-duty firefighters and their numbers might be expected to decline. Defendant has not offered any evidence on this point, nor any other evidence indicating that plaintiffs' presence at fire scenes is necessary for effective fire suppression. Thus, it has not been adequately demonstrated "that plaintiffs' primary duty is to aid fire fighters in putting out fires[,]" Alexander v. Kansas City, Kansas, 1993 U.S. Dist. LEXIS 14505, at *16 (footnote omitted), and, accordingly, the four-factor test in §553.210(a) is not controlling, although, as will be more fully explained infra, the court's analysis would not change if it were.

Section 553.210(a) also includes paramedics if they "form an integral part of the public agency's fire protection activities." "Integral part" is not defined by the regulations, but a citation to § 553.215 is present following this sentence. Section 553. 215(a) contains the training and regular dispatch requirements applied by the court in the October order. Defendant seems to

agree with the court's implicit determination that § 553.215 should be used for assessing whether paramedics "form an integral part of the public agency's fire protection activities." (Suggestions in Support of Defendant's Motion for Summary Judgment, p. 7).[8] The

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[8]Courts are not unanimous on this point. In Alexander, Judge Lungstrom proceeded under the assumption that the "integral part" language in §553.210(a) meant something other than the two-part test in §553.215. Alexander v. City of Kansas City, Kansas, 1993 U.S. Dist. LEXIS 14505, at *17-*19. The Fifth, Sixth, and Seventh Circuits, on the other hand, agree that the regulations state only one test for paramedics, regardless of whether they are employed by the fire department or by a separate public agency. See Alex v. City of Chicago, 29 F.3d 1235, 1241 (7th Cir. 1994); Justice v. Metropolitan Government of Nashville, 4 F.3d 1387, 1395 (6th Cir. 1993); Bond v. City of Jackson, 939 F.2d 285, 287 (5th Cir. 1991); see also Littlefield v. Town of Old Orchard Beach, 780 F.Supp. 64, 67 (D. Maine 1992).

The view of these circuit courts appears consistent with the following portion of the legislative history to the §7(k) exemption:

> MR. MITZELL . . . Mr. Speaker, I would like to direct a question to the ranking member of the General Labor Subcommittee (MR. QUIE) with respect to section 6 of the conference report, 'Federal and State employees.'
> That section departs from the standard FLSA "hours of work" concept for public agency employees who are engaged in fire protection and law enforcement "activities." Was it the intent of the conference committee to cover by such language employees who are engaged in the rescue-ambulance services-activities of a

court will therefore adhere to the framework used in the prior

> public agency?
>
> MR. QUIE. The gentleman is correct that provision, section 6(c), is intended to cover those employees directly employed by a public agency who are engaged in rescue or ambulance activities which are substantially related to fire protection or law enforcement activities. In some instances these rescue or ambulance crews are a part of the fire or police department. In other cases they must be under a separate department of the same public agency, but their activities substantially include rescue and ambulance work associated with fire protection and law enforcement. In that case these employees are covered by the unique provisions of section 6(c) . . . . Does the Chairman of the General Labor Subcommittee [MR. DENT] concur in that understanding?
>
> MR. DENT. That is correct.

Horan v. King County, Wash. 740 F.Supp. 1471, 1477 (W.D. Wash. 1990) (quoting 120 Cong. Rec. 8598 (1974)) (emphasis added).

Judge Lungstrom, in applying the purportedly distinct "integral part" test, examined the frequency of response to fire suppression calls along with other factors commonly used in assessing the "regular dispatch" test, which indicate that the distinction may not have a measurable impact. Compare Alexander v. City of Kansas City, Kansas, 1993 U.S. Dist. LEXIS 14505, at *19-*21, with O'Neal v. Barrow County Bd. of Comm'rs, 980 F.2d at 679 (listing factors used in measuring regularity of dispatch).

order.[9]

Paramedics are eligible for the partial exemption in 29 U.S.C. §207(k) only to the extent that they engage in fire protection activities. Wouters v. Martin County, 9 F.3d 924, 929 (11th Cir. 1993), cert. denied, 115 S.Ct. 65 (1994). The language of §553.212(a) is also inconsistent with defendant's attempt to treat emergency medical calls as exempt. Section 553.212(a) states, in pertinent part: "employees engaged in fire protection or law enforcement activities as described in §§553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities." (emphasis added). Essentially, defendant's argument is that if the four-part test in §553.210(a) is met (which it is not here), the meaning of the term "fire protection" inexplicably expands so as to encompass emergency medical calls. However, "[t]he [defendant] may not merely assign the paramedics to the fire department as a means to justify withholding overtime wages if the paramedics perform a much broader emergency function than their role in fire protection activities." Alexander v. City of Kansas City, Kansas, 1993 U.S. Dist. LEXIS 14505, at *20.[10] Defendant's position would allow just that by expanding the definition of "fire protection activities" in §553.212(a) whenever

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[9]Any error in the court's analysis would, in any event, simply limit damages to the period before January 1992.

[10]Combining a fire department with an EMS division also appears to be inconsistent with the departmental assignments contemplated by the regulations. It suggests using the fire department as a "cover" to achieve a claim of exemption.

emergency medical technicians are placed under the aegis of the fire department. Nevertheless, the standards for applying the 80/20 rule do not vary with the applicability of §553.210(a) or §553.215(a), and thus the alleged "wrong turn" does not affect the outcome of the 80/20 analysis.[11]

Defendant continues to assert that all on-call time is exempt, even if spent on required activities that otherwise would be treated as nonexempt. Defendant appears to believe that Alexander supports this position. Alexander referred to O'Neal

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[11]Defendant challenges footnote 6 in the October order, in which the court stated that "[t]he parties agree that time spent on emergency medical calls is nonexempt[.]" It is true that, in its briefing relating to the summary judgment motions, defendant set forth its theory that the definition of "fire protection activities" in §553.212(a) should be expanded when the four-part test of §553.210(a) was met. However, defendant stated that, even if the emergency medical calls were treated as nonexempt, all of the other challenged activities were performed while plaintiffs were on call, and were thus exempt, a position the court did not accept.

Since the court implicitly rejected defendant's claim that the four-part test in §553.210(a) was met and instead applied §553.215(a), the court did not adopt defendant's unrecognized "expansion theory" with respect to emergency medical activities and treated these activities as nonexempt. To the extent that defendant is claiming that emergency medical activities are exempt even if the four-part test in § 553.210(a) is not satisfied (which the court did not previously understand to be defendant's contention), the court rejects that construction of §553.212(a) for the reasons stated in the body of this order.

for a definition of nonexempt activities, and O'Neal does not indicate that otherwise nonexempt activities can be "purified" by being assigned to be performed sometime during a shift when the paramedics are on-call. Time that relates both to the fire protection and maintenance, should be treated as exempt. However, activities that inure solely to the benefit of the city, such as emergency medical calls and the associated paperwork, cannot be considered exempt under the O'Neal framework.[12]

Defendant protests that "it is unreasonable to hold that an ambulance employee is performing nonexempt work when he/she is performing exactly the same kind of ambulance-related work as is his/her normal duty." (Defendant's Memorandum on Summary Judgment Issues, pp. 8-9). Nonetheless, the partial exemption contained in 29 U.S.C. §207(k) is designed for fire fighting and law enforcement activities, not emergency medical activities. The court's holding is not unreasonable viewed in that

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[12]Defendant's contention that the O'Neal definitions should not apply because that case arose under §553.215(a) is unpersuasive. Contrary to defendant's contention, I believe, this case also arises under §553.215(a). Further, §553.212(a), by its terms, applies as something of a "floor," regardless of whether the case falls under §553.210(a) or §553.215(a), and defendant provides no valid reason for applying a different definition of nonexempt work. Defendant does not explain why O'Neal's rationale for treating emergency medical calls as nonexempt (i.e., these calls benefit the city through fees rather than the public at large) somehow ceases to be relevant if the paramedics meet the four-part test in §553.210(a).

light. Defendant further submits that the Eleventh Circuit's requirement that the regular dispatch test and the 80/20 rule be separately satisfied allows the 80/20 rule to "swallow[ ] the whole of the regulations." (Defendant's Memorandum on Summary Judgment Issues, p. 9) (footnote omitted). This contention is effectively answered by Justice v. Metropolitan Government of Nashville, 4 F.3d 1387, 1399 n. 7 (6th Cir. 1993), in which the court noted the overlap between the two requirements but kept them distinct because of the possibility of satisfying one of these standards but not the other. Defendant's motion for reconsideration has not persuaded the court to adopt a different legal standard.

II. Analysis of §553.215(a) and the 80/20 Rule in Light of the Stipulated Facts

The stipulation does not change the court's prior conclusion that plaintiffs met the training requirement of §553.215(a) (nor was it intended to). Plaintiffs respond to all "regular alarm"[13] and "general alarm"[14] fires. Plaintiffs generally do not respond to "still fires."[15] Paramedics respond to approximately fifty percent of the approximately 280 fire-related calls received per year by defendant. Fire-related calls account for eleven percent of the total number of calls, and approximately two hours of

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[13]A "regular alarm" entails a residential fire.

[14]A "general alarm" is given for apartment building or commercial fires.

[15]A "still alarm" is any alarm other than a regular or general alarm.

each twenty-four hour shift are spent on activities directly related to fire protection.

The three-prong test promulgated by the Eleventh Circuit, which considers (1) the percentage of calls that are dispatches to nonexempt activities; (2) the percentage of hours spent on covered activities; and (3) the percentage of all covered activities to which the paramedics are dispatched, O'Neal v. Barrow County Bd. of Comm'rs, 980 F.2d at 679, appears to be the most viable for measuring the regularity of dispatch. Under the stipulated facts, approximately twenty percent of each shift, in terms of both total calls and hours worked, is spent on exempt activities. Paramedics are dispatched to approximately fifty percent of fire-related calls, which make up eleven percent of the total number of calls. The court again concludes that the regular dispatch requirement is probably satisfied.

The stipulation of facts has clarified and expanded upon the time spent by plaintiffs on various activities during each shift. During each twenty-four hour shift, plaintiffs responded to an average\age of 2.82 calls for emergency medical service, and .28 calls for vehicular accidents. On average, each emergency medical service call took approximately one hour, and each vehicular accident call took approximately one hour. During each shift, plaintiffs responded to approximately .34 calls that related to fires and/or natural disasters. Each of these calls took approximately thirty minutes.

Each emergency medical call and each vehicular accident call required approximately thirty minutes of paperwork, and plaintiffs spent an average of fifteen minutes per call per shift on

such paperwork. Plaintiffs spent an additional fifteen minutes per call per shift completing Missouri Ambulance Run forms, which are required by the state of Missouri.

During each shift, plaintiffs spent an average of twenty-five minutes on training related to emergency medical services (and unrelated to fire-protection activities). Plaintiffs also spent, on average, fifteen minutes per shift on self-study activities unrelated to fire-protection activities, such as reading periodicals relating to emergency medical services.

Approximately thirty minutes of each shift were spent on preparing the interior of the ambulance for use during the shift, and another thirty minutes were spent on routine maintenance of the ambulance. Approximately fifteen minutes were spent on intradepartmental mail deliveries, and fifteen minutes were spent on delivery and pick up of uniform laundry. Plaintiffs spent the time remaining on each shift eating, relaxing, and sleeping.[16] Plaintiffs were on call during this time.

Defendant has not persuaded the court to change the standards for exempt and nonexempt work contained in the October order, and thus the following activities are exempt:

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[16]This is the kind of on-call time that courts treat as exempt, see O'Neal v. Barrow County Bd. of Comm'rs, 980 F.2d at 681 n.31, as opposed to time spent performing otherwise nonexempt activities.

The time spent responding to automobile accidents;[17] the intradepartmental mail deliveries; the delivery and pick up of laundry; the time spent preparing the interior of the ambulance for duty; the time spent on routine maintenance; and the time spent on activities directly related to fire protection, including completion of the state-required forms for fire-related calls.

Three hours, thirty-one and one-half minutes per shift were spent on emergency medical calls;[18] 42.3 minutes[19] per shift were spent on the ambulance forms for emergency medical calls required by the state; 42.3 minutes[20] were spent on additional paperwork associated with the emergency medical calls; twenty-

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[17]See Wouters v. Martin County, 9 F. 3d at 932; O'Neal v. Barrow county Bd. of Comm'rs, 980 F.2d at 681 n. 28. Although plaintiffs believe that such time should be treated as nonexempt, the foregoing decisions are reasonably clear that such time is considered separately from fire-related activities for purposes of the regular dispatch test but is combined with those activities when applying the 80/20 rule.

[18]/This figure includes the time spent returning form emergency medical calls of fifteen minutes on average per call (2.82 multiplied by fifteen minutes per call per shift). Plaintiffs were required to respond to such calls, which necessitated the return time, and these calls inured to the benefit of defendant. See O'Neal v. Barrow County Bd. of Comm'rs, 980 F.2d at 681.

[19]2.82 (average emergency medical calls per shift) multiplied by fifteen minutes (average time spent per call per shift on the forms).

[20]See supra note 19.

five minutes per shift were spent on unrelated training; and fifteen minutes per shift were spent on unrelated self-study. These activities total approximately five hours, thirty-six minutes. Plaintiffs therefore spent more than twenty percent of their total hours worked per shift on nonexempt activities,[21] and defendant is not entitled to the partial exemption of § 7(k).

Defendant's motion for reconsideration is accordingly DENIED. Pursuant to the parties' stipulation, count IV of the second amended complaint is DISMISSED, without prejudice. SO ORDERED.

/s/ Howard F. Sachs
HOWARD F SACHS
SENIOR DISTRICT JUDGE

Dated: December 22, 1995.

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[21]Although established rules support the above calculation, it is clear that the great bulk of what may be characterized as plaintiffs' most productive time is in work that is not in firefighting activities, broadly defined. The parties have not agreed on the time devoted to backstopping firefighting activities, before disengaging "as soon as reasonably practicable in order to be available for other calls," but it appears to be rather minimal. The career priorities are obvious.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 96-1646/1777

Kevin D. Christian; Brian Helland; Larry Kipping,	*	
Appellees/ Cross-Appellants,	*	
v.	*	Appeals from the United States District Court for the Western District of Missouri.
The City of Gladstone, Missouri,	*	
Appellant/Cross-Appellee.	*	
The Missouri Municipal League,	*	
Amicus Curiae.	*	

Submitted: December 11, 1996

Filed: March 17, 1997

Before WOLLMAN and MURPHY, Circuit Judges, and TUNHEIM,[1] District Judge.

MURPHY, Circuit Judge.

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[1]The Honorable John R. Tunheim, United States District Judge for the District of Minnesota, sitting by designation.

The City of Gladstone appeals from a judgment awarding backpay and attorney fees to three public safety officer paramedics who cross-appeal the amount of their award. The paramedics claim that under § 207(a) of the Fair Labor Standards Act (FLSA), 29 U.S.C. §§201-219, they are entitled to overtime pay for any hours worked in excess of forty hours each week. The City argues that the FLSA does not require overtime pay for the paramedics because they fit within a statutory exception under § 207(k) for employees in fire protection activities. The district court granted summary judgment for the paramedics, concluding that the City had not established the partial overtime exception but awarding them less overtime pay than they sought. We reverse.

The parties have stipulated the facts. The City has created a Public Safety Department to unify the emergency response for fires, medical emergencies, and police calls, as well as the administrative support for those services. The Department is divided into four bureaus: administrative, support services, law enforcement, and fire/emergency medical services (fires/ems). Employees in the law enforcement and fire/ems bureaus are cross-trained so that they may respond to a variety of emergency situations. The fire/ems bureau employs sixteen public safety officers who are trained and certified as firefighters, seven of whom are also cross-trained as paramedics.

The paramedics in the fire/ems bureau respond to fire alarms, accident scenes, and medical emergencies. They are available to respond to all fire calls, and they are dispatched to approximately 50% of the total fire alarms each year, including since 1992 all fire alarms where a fire is confirmed and some

still alarms where the cause of the alarm is unknown. They are responsible for fighting fires when they arrive at the scene, but they leave when they can in order to be available for other calls. Fire alarms make up about 11% of their calls, car accidents about 9%, and the remaining calls are other accidents and medical emergencies.

Because the work involves considerable time waiting for calls, the City uses a scheduling system of rotating shifts in the fire/ems bureau. The public safety officers and paramedics are on duty 24 hours and then have 48 hours off, working a total of nine days in a twenty-seven day period. This scheduling permits the employees of the fire/ems bureau to eat, relax, and sleep while waiting for calls, as well as to perform other necessary support services such as training and maintaining equipment.

Three of the seven paramedics in the fire/ems bureau sued the City, alleging that the City failed to pay them overtime for hours worked in excess of forty hours each week. The City contended that under § 207(k) it was not required to pay overtime based on a forty hour workweek because the paramedics were employees in fire protection activities and were thus permitted to work 212 hours in a 28 day period before being entitled to overtime. The district court concluded that although the paramedics were engaged in fire protection activities, they did not fall under the exception because they spent more than 20% of their time on activities unrelated to fire calls.

I.

The first issue raised on appeal is whether the district court erred in concluding that the paramedics were employees in fire protection activities as defined in § 207(k). The paramedics argue that they are not because they do not respond to all still alarms, spend less time on fire calls than medical calls, and attend to more medical emergencies than fire alarms or car accidents. The City counters that the paramedics are fire protection employees because they are responsible for fighting fires and their paramedic activities are substantially related to firefighting. A grant of summary judgment is reviewed de novo. Crawford v. Runyon, 37 F.3d 1338, 1340 (8th Cir. 1994).

The FLSA generally requires employers to pay employees overtime compensation for any hours worked in excess of forty hours each week. 29 U.S.C. § 207(a). Because the nature of emergency service work does not fit the normal pattern of forty hour workweeks, Congress enacted § 207(k). This section provides a partial overtime pay exception for "any employee in fire protection activities or any employee in law enforcement activities" and permits them to work a total of 212 hours during a work period of 28 days before being entitled to overtime compensation. S. Rep. No. 93-690, at 24 (1974); see S. Rep. No. 99-159, at 5 (1985). This allows the use of rotating schedules where employees work 24 hours and then have 48 hours off.

The statutory section creating a partial overtime exception does not itself define what is meant by "employee in fire protection activities," but the related regulations provide a definition. The term includes

any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. . . . The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See s 553.215.

29 C.F.R. § 553.210(a).

The district court concluded the paramedics did not meet the four-part test because the City had not established that the paramedics have the legal duty and responsibility to fight fires or that they perform activities concerned with fire suppression and prevention. It went on to consider the additional definition in the regulations which states that the section includes "rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities." The City argues that the paramedics meet the four-part test, but the paramedics respond that fighting fires is not their primary duty.

The paramedics concede they meet the first two parts of the test in § 553.210(a): they are employed by an organized fire department and have been certified by the state of Missouri to fight fires. The stipulated facts also show that the paramedics

have the legal authority and responsibility to fight fires (part three) and that they perform activities required for firefighting (part four). They are thus employees "in fire protection activities."

A central consideration under the test is whether an employee actually fights fires. See Carlson v. City of Minneapolis, 925 F.2d 264, 265 (8th Cir. 1991) (per curiam) (arson investigators who did not fight or extinguish fires not fire protection employees under four-part test). Paramedics who are not permitted to fight fires or enter a burning building and who are only dispatched to fires to treat injured individuals are not engaged in fire protection activities under the four-part test. Nalley v. Baltimore, 796 F. Supp. 194, 200 (D. Md. 1992). The paramedics here are sworn firefighters, however, and they respond to every fire alarm where a fire has been confirmed, as well as some alarms where a fire has not been confirmed, amounting to approximately 50% of all fire alarms each year. They fight fires at those alarms, constitute over 40% of the public safety officers in the fire/ems bureau and on each shift, and perform fire protection support services such as equipment maintenance and training. The four-part test has no requirement that firefighting be the employees' only or primary duty, and the fact that the paramedics are also able to provide medical services while at fires and elsewhere does not eliminate their responsibility for firefighting. These paramedics are employees in fire protection activities under the four-part test in § 553.210(a), and whether they fit within the statutory exception

under any alternative test does not therefore need to be considered.[2]

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[2]Since the district court found that the four-part test was not met, it went on to consider whether the paramedics were an integral part of the fire/ems bureau. The "integral part" definition in § 553.210(a) is cross-referenced to § 553.215(a) of the regulations. The latter section provides that ambulance and rescue personnel who are "substantially related to firefighting" are included within the exception, and the district court used the factors outlined in that section to determine whether the paramedics fit within the exception. See Alex v. City of Chicago, 29 F.3d 1235, 1241 (7th Cir. 1994) (factors in §553.215(a) provide the additional method by which paramedics who do not meet the four-part test may still come within the exception); but see O'Neal v. Barrow County Bd. of Comm'rs, 980 F.2d 674, 676-77 (11th Cir. 1993) ("integral part" test of §553.210(a) applies to employees of a public agency that engages in fire protection; "substantially related" test of §553.215(a) applies to employees who are not within such an agency; exception can be established under either).

Section 553.215(a) provides two factors for ambulance and rescue service employees to be "substantially related" to firefighting: they must be "train[ed] in rescue" and "regularly dispatched to fires, crime scenes, riots, natural disasters and accidents." 29 C.F.R. § 553.215(a). The paramedics here concede that they are trained in rescue, and the stipulated facts establish that they are regularly dispatched. They respond to every alarm where a fire has been confirmed as well as to some still alarms, amounting to approximately 50% of all fire calls received in the fire/ems bureau each year, and are frequently dispatched to accident scenes and other medical emergencies. See Bond v. City of Jackson, 939 F.2d 285, 288 (5th Cir. 1991) (personnel are regularly dispatched

29 C.F.R. § 553.212(a). Nonexempt work is not defined, but the regulation gives an example of such work as "firefighters who work for forest conservation agencies . . . and plant trees" during slack periods. This example is far removed from the type of activities the stipulated facts show the paramedics perform in this case.

The district court applied §553.212 and concluded that the paramedics did not fall under the overtime exception because it believed that over 20% of their work time involved activities unrelated to firecalls. The court examined the paramedics' typical day and classified each activity as exempt or nonexempt. It concluded that time spent waiting for calls, responding to fires

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if they respond to accidents and co-respond with the fire department to over 90% of emergency medical service calls). Unrelated activities, such as patient transfers, do not make these paramedics unavailable for dispatch. See Spires v. Ben Hill County, 980 F.2d 683, 689 (11th Cir. 1993). The paramedics would therefore also fall within the §207(k) exception under the factors set forth in §553.215(a).

Section 553.212(a) states that:

> Employees engaged in fire protection or law enforcement activities as described in §553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. . . . A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fire protection or law enforcement activities for purposes of this part.

and car accidents and completing associated paperwork, maintaining vehicles, and doing support tasks such as mail delivery and laundry services was related to fire protection and thus exempt. Time spent responding to, returning from, or completing paperwork on medical calls or accidents other than car accidents, and time spent devoted to emergency medical training or study related to emergency medical services was considered unrelated to fire protection and nonexempt. By this calculation, nonexempt work took up five hours and thirty-six minutes of the typical 24 hour day, exceeding the 20% limitation in § 553.212(a). The district court concluded that the paramedics were therefore entitled to receive overtime compensation based on a forty hour workweek.

The City argues it was error to consider time spent on accident and emergency medical calls other than fires or car accidents as nonexempt work. The paramedics contend that such time was properly counted as nonexempt because it is not related to fire protection activities.

Courts which have considered the meaning of nonexempt work in §553.212 focus on how a particular task relates to firefighting. One approach considers whether the work "is distinct form and unrelated to fire protection activities" and whether "the essential nature of the firefighter's job changes and he is required to perform tasks unrelated to his job." Schmidt v. County of Prince William, 929 F.2d 986, 990 (4th Cir. 1991) (en banc) (internal quotations omitted). Under this approach, firefighters who spend all their time dispatching are engaged in exempt work and fit within the overtime exception even though the regulations specifically exclude civilian employees who

perform such work from the exception. Id. at 989-90. Another approach defines nonexempt work broadly as any work that "generally inures to the benefit of the employer . . . which the employer requires its employees to do while they are not engaged in activities related to their fire protection or law enforcement duties." O'Neal, 980 F.2d at 681. Courts adopting this approach have indicated that to be related to fire protection duties and exempt, the work must stem from a fire call or car accident. Under this approach, calls involving paramedic services related only to medical emergencies would be nonexempt. Id.

The better approach is that adopted by the Fourth Circuit in Schmidt because it fits the broad language used by Congress in extending the overtime exception to "any employee in fire protection activities." The legislative history indicates that Congress recognized that employees in fire protection and law enforcement activities regularly work more than forty hours each week, but believed "the actual impact on State and local governments . . . of a 40 hour standard will be virtually nonexistent" because of the overtime exception in §207(k). H.R. Rep. No. 93-913 (1974), reprinted in 1974 U.S.C.C.A.N. 2811, 2838; see also S. Rep. No. 93-690, at 24 (1974). It also shows an intent to include paramedic and rescue work that is substantially related to fire protection within the term of "fire protection activities" in §207(k): "[The statutory exception] is intended to cover those employees directly employed by a public agency who are engaged in rescue or ambulance activities which are substantially related to fire protection or law enforcement activities." 120 Cong. Rec. 8598 (1974); see also Justice v. Metropolitan Gov't of Nashville, 4 F.3d 1387, 1395-96 & n.2 (6th

Cir. 1993) (discussing legislative intent behind exemption; Horan v. King County, 740 F. Supp. 1471, 1475-78 & n.3 (W.D. Wash. 1990) (same). Based on this legislative history, every circuit which has considered the issue has concluded that ambulance and rescue service personnel could thus be within the term "employee in fire protection activities." See, e.g., Alex, 29 F.3d at 1239 (7th Cir.); Justice, 4 F.3d at 1393 (6th Cir.); O'Neal, 980 F.2d at 677 (11th Cir.); Bond, 939 F.2d at 288 (5th Cir.).

This approach also conforms with the application of the related regulations interpreting §207(k) by the Department of Labor. The Department has recognized that emergency medical services personnel respond to a variety of emergency calls, but in interpreting how to apply its regulations defining "employee in fire protection activities, " it has not taken the position that only time spent by rescue and ambulance personnel on calls stemming from fires or car accidents is related to fire protection activities for purposes of the overtime exception. See, e.g., DOL, Wage & Hour Div., Ltr. Rul. (Jan. 9, 1992) (no requirement of a breakdown of calls stemming from fires, car accidents, and other emergencies); DOL, Wage & Hour Div., Ltr. Rul. (Oct. 9, 1987) (same). The Department's interpretation of its regulations is not "plainly erroneous or inconsistent with the regulation" and can be controlling as long as it complies with the limits of the statute. Auer v. Robbins, 1997 WL 65558, at *6 (U.S. 1997).

Section 553.212 does not require overtime for employees in fire protection activities who spend their day in exempt activities related to fire protection. See Schmidt, 929 F.2d at 990

("[Dispatching] is clearly related to firefighting, and the 20% limitation simply has no application to this case."); see also Bond, 939 F.2d 285 (no application of 20% limitation when paramedics are substantially related to fire protection and spend day co-responding with the fire and police departments). Here, the stipulated facts show that the paramedics respond to fires, fight them, and provide paramedic services at those fires, as well as on calls not involving fires. Nearly all of their time is spent on such activities, related training, support services, and waiting for calls, and they do not spend much time on activities unrelated to their firefighting or emergency medical service activities. providing paramedic services on accident and medical emergency calls not stemming from a fire or car accident does not alter the nature of their duties or cause them to perform tasks unrelated to their job. The district court thus erred by considering time spent on paramedic activities not stemming from a fire or car accident as nonexempt. Section 553.212 does not apply here to defeat the partial overtime exception or the paramedics.

III

Since the City established that the paramedics are employees engaged in fire protection activities, the § 207(k) partial exception to the overtime pay requirement applies. The paramedics were not entitled to summary judgment, and we reverse and remand for entry of judgment in favor of the City. The City's appeal regarding the amount of attorney fees awarded and the cross-appeal claiming entitled to more overtime pay than awarded are dismissed as moot.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 96-1646/1777WMKC

Kevin D. Christian; Brian Helland; Larry Kipping,	*	
Appellees/Cross-Appellants,	*	
v.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
The City of Gladstone, Missouri,	*	
Appellant/Cross-Appellee.	*	

The suggestion for rehearing in banc is denied. The petition for rehearing by the panel is also denied.

April 24, 1997

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

EXCERPTS FROM THE CODE OF FEDERAL REGULATIONS

EXEMPTION REQUIREMENTS

29 C.F.R. § 553.210 Fire protection activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee . . . in fire protection activities" refers to any employee (1) who is employed by an organized fire department or fire protection district; (2) who has been trained to the extent required by State statute or local ordinance; (3) who has the legal authority and responsibility to engage in the prevention, control or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, including such incidental non-firefighting functions as housekeeping, equipment maintenance, lecturing, attending community fire drills and inspecting homes and schools for fire hazards. The term would include all such employees, regardless of their status as "trainee," "probationary," or "permanent," or of their particular specialty or job title . . . and regardless of their assignment to support activities of the type described in paragraph (c) of this section, whether or not such assignment is for training or familiarization purposes, or for reasons of illness, injury or infirmity. The term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities. See § 553.215.

29 C.F.R. § 553.212 Twenty percent limitation on nonexempt work.

(a) Employees engaged in fire protection activities or law enforcement activities as described in §§ 553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties. The performance of such nonexempt work will not defeat either the section 13(b) 20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during workweek or applicable work period. A person who spends more than 20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in fore protection or law enforcement activities for purposes of this part.

29 C.F.R. § 553.213 Public agency employees engaged in both fire protection and law enforcement activities.

(a) Some public agencies have employees (often called"public safety officers") who engage in both fire and law enforcement activities, depending on the agency needs at the time. This dual assignment would not defeat either the section 13(b)(20) or 7(k) exemption, provided that each of the activities performed meets the appropriate test set forth in §§ 553.210 and 553.211. This is so regardless of how the employee's time is divided between the two activities. However, all time spent in nonexempt activities by public safety officers within the work period,

whether performed in connection with fire protection or law enforcement functions, or with neither, must be combined for purposes of the 20 percent limitation on nonexempt work discussed in § 553.212.

(b) As specified in §553.230, the maximum hours standards under section 7(k) are different for employees engaged in fire protection and for employees engaged in law enforcement. For those employees who perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

29 C.F.R. § 553.215 Ambulance and rescue service employees.

(a) Ambulance and rescue service employees of a public agency other than a fire protection or law enforcement agency may be treated as employees engaged in fire protection or law enforcement activities of the type contemplated by sections 7(k) and 13(b)(20) if their services are substantially related to firefighting and law enforcement activities in that 1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims or firefighters and law enforcement personnel injured in the performance of their respective duties, and 2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters and accidents. As provided in § 553.213(b), where employees perform both fire protection and law enforcement activities, the applicable standard is the one which applies to the activity in which the employee spends the majority of work time during the work period.

Supreme Court, U.S.
FILED
OCT 21 1997
CLERK

No. 97-151

In The

Supreme Court of the United States

October Term, 1997

KEVIN CHRISTIAN, *et al.*,

Petitioners,

v.

CITY OF GLADSTONE, MISSOURI,

Respondent.

On Petition For A Writ Of Certiorari To The Eighth Circuit Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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THE QUESTIONS PRESENTED

1. The first question presented for review by Petitioners does not describe an issue in controversy here or in any other reported case. No one would disagree but that the nature and character of an employee's activities must be examined to determine their status under Section 207(k). These cases are necessarily and always fact specific since municipalities organize, train and assign their public safety employees differently from one another depending upon the particular circumstances of their communities. In this case, the intertwined fire and paramedic responsibilities for the plaintiffs were fully considered by the court below in making its exemption decision. The cases relied upon by Petitioners are factually inapposite as they all involved factual situations where the paramedics at issue were not trained as firefighters or were not functionally integrated in the fire department or were never assigned as first responding firefighters. The facts make a difference and no court has held otherwise.

2. The second question for which review is sought is not clear. There is no dispute but that the plaintiffs here were regularly dispatched to fires and were an integral part of the City's fire protection activities. The parties stipulated that two of the five firefighters on duty during every shift were cross-trained as paramedics and that they responded to every significant fire emergency call received by the City.

There was a dispute below, and there has been some disagreement among the lower courts, as to where to

THE QUESTIONS PRESENTED – Continued

draw the line factually in distinguishing exempt from nonexempt work for purposes of the "80/20" rule set forth by the Secretary of Labor at 29 C.F.R. § 553.212, which provides:

> Employees engaged in fire protection or law enforcement activities as described in §§ 553.210 and 553.211, may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their fire protection or law enforcement activities. . . . The performance of such nonexempt work will not defeat [the Section 7(k) exemption] unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period.

The regulations do not define what constitutes "nonexempt work," let alone "nonexempt work which is not performed as an incident to or in conjunction with their fire protection activities." The only indication of what was intended is the following example of nonexempt work from the regulation:

> For example, firefighters who work for forest conservation agencies may, during slack times, plant trees and perform other conservation activities unrelated to their firefighting duties.

As recognized by the District Court here "the distinction between exempt and nonexempt activities, although crucial for purposes of § 7(k), has not been explored with any specificity." (October 10, 1995 Memorandum and Order, p. 8). Petitioners are asking this Court to rewrite or

THE QUESTIONS PRESENTED – Continued

clarify the regulations or to add definitions where they are silent.

RESPONDENT'S BRIEF IN OPPOSITION

Section 207(k) of the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.*, allows for the employees of municipalities who are engaged in fire protection activities to be employed for up to 212 hours in a 28-day work period without being paid at an overtime rate. This provision permits regular work schedules of 24 hours on duty followed by 48 hours off duty without overtime being required for those hours in excess of 40 in a particular 7-day workweek. The case at hand involves the application of the Section 207(k) exemption to firefighters of the City of Gladstone who are cross-trained as paramedics and who perform combined firefighter/paramedic duties as part of the City's functionally integrated Public Safety Department.[1] The Eighth Circuit held that the City's firefighter/paramedics were properly included within the ambit of the Section 207(k) exemption.

REASONS FOR DENYING THE PETITION

1. Petitioners have not accurately described the facts presented by this case. For example, Petitioners claim they "spent virtually all their time in activities

[1] The firefighter/paramedics here were also cross-trained as police officers and sometimes were assigned to work in the law enforcement division for 28-day work periods. Under Section 207(k), employees assigned such law enforcement activities must be paid overtime for hours in excess of 171 during the period. Plaintiffs' law enforcement work is not an issue in the case.

related to providing purely emergency medical services. . . . " (Petitioners' Brief, p. 5). To the contrary, the parties stipulated that, on average, for each 24-hour shift, plaintiffs spent more than 13 hours eating, sleeping and relaxing while standing available for emergency calls; 2 hours in direct fire prevention activities other than waiting for or responding to fire calls; and approximately 3.5 hours on activities that were useful both for fire prevention and medical emergency purposes. Therefore, although a majority of their calls for emergency service were for medical problems rather than firefighting, only a small portion of their workday was taken up by either category of such calls.

2. Petitioners misstate the holding of the Eighth Circuit. That court *did not* find, as claimed by Petitioners, "that public employee paramedics can be treated as firefighters when the paramedics are not regularly dispatched to fires, are not an integral part of the fire protection activities and spend more than 20% of their time in activities that do not qualify for the exemption." (Petitioners' Brief, p. 8). In the case at hand, it was stipulated that the firefighter/paramedic group (1) constitutes 40% of the on-duty firefighting capability of the City at any given time and (2) are the first responding firefighters to any regular or general alarm in the City. (Stipulation of Facts, paras. 9, 11 and 8). In short, there was no question below but that plaintiffs *were* regularly dispatched to fire scenes and *were* an integral part of the City's fire protection activities.

3. Petitioners also claim that the Eighth Circuit "incorrectly found that a purely emergency medical call made by a paramedic for such things as an intestinal flu

complaint, a complaint of chest pain or a similar illness to be exempt even though such work has absolutely no relationship to a fire protection activity." (Petitioners' Brief, pp. 8-9). Petitioners cite no part of the Eighth Circuit's opinion as supporting this claim as to the court's finding; as, indeed it appears nowhere in the opinion.

4. There is no substance to Petitioners' claim that "as a consequence of this decision, the thousands of paramedics throughout the Eighth Circuit will be treated in an inferior manner to . . . other paramedics throughout the country." (Petitioners' Brief, p. 9). The case at hand has no application to paramedics generally. It applies only to individuals who are cross-trained both as firefighters and paramedics and who constitute an integral part of a municipality's fire protection activities. There is no other reported case dealing with the exemption status of a combination firefighter/paramedic so there is no basis for asserting that similarly-situated employees will be treated differently if the ruling is left to stand. Indeed, there is no conflict as Petitioners allege.

5. The City of Gladstone's operation of its Public Safety Department is significantly different from that of the employers in the cases cited by Petitioners as being in conflict with the Eighth Circuit's holding. In particular, as previously stated, the employees here are fully trained firefighters who regularly respond to fire calls as firefighters. In none of the cases cited by plaintiff as presenting a "conflicting" holding were the employees there at issue trained and utilized as "first responder" firefighters. As such, there is no basis for asserting that the Eighth Circuit holding is in conflict with any other holding nor does the

case present a suitable vehicle to address questions dealing generally with the inclusion of paramedic groups under the ambit of Section 207(k). There is no reason to believe other circuits, when presented with similar facts, would reach a different result.

6. The Department of Labor's regulations dealing with the inclusion of paramedic groups within the ambit of Section 207(k) are less than models for clarity and have caused confusion in the lower courts when applied to paramedics who are not trained or deployed as firefighters. But the regulations were not challenged below and it should not be this Court's function to rewrite the regulations or to otherwise pass on their validity in the posture of this case.

CONCLUSION

Respondent submits that the petition for certiorari should be denied.

Respectfully submitted,

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